United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1415

To be argued by
JONATHAN J. SILBERMANN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

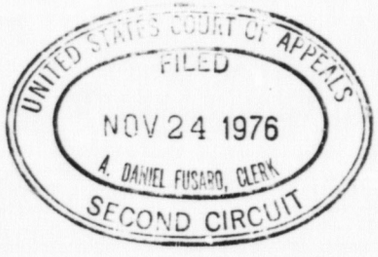
WALTER SWIDERSKI and
MARITZA DE LOS SANTOS,

Defendants-Appellants.

Docket No. 76-1415

BRIEF FOR APPELLANT
WALTER SWIDERSKI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- WALTER SWIDERSKI and MARITZA DE LOS SANTOS, Defendants-Appellants.	Docket No. 76-1415

BRIEF FOR APPELLANT WALTER SWIDERSKI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Judge's instructions which permitted the jurors to convict for the felony charged if they found appellants' possession of cocaine and the intent to use it themselves were erroneous, and require reversal.

2. Whether the prosecutor's improper cross-examination about co-defendant De Los Santos' post-arrest silence violated due process and requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) rendered on September 13, 1976, after a jury trial, convicting appellant Walter Swiderski of possessing with intent to distribute 21.5 grams of cocaine, in violation of 21 U.S.C. §§812, 841(a)(1) and (b)(1)(A). Appellant Swiderski was sentenced pursuant to 18 U.S.C. §3651 to a two-year term of imprisonment, with six months to be served in a jail-type institution. Execution of the balance of the sentence was suspended and concurrent three-year terms of probation and special parole following release from confinement were imposed.

Appellant Swiderski was permitted to remain free pending appeal on a $1,500 personal recognizance bond. The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1]

Appellant Walter Swiderski and his then-fiancee,[2] Maritza De Los Santos, were indicted on August 8, 1975, in the Southern District of New York. It was alleged that on June 3, 1975, they possessed with intent to distribute 21.5 grams of cocaine and 7.6 grams of marijuana, in violation of 21 U.S.C. §§812, 841(a)(1) and (b)(1)(A); 8 U.S.C. §2.

B. The First Trial and Appeal

The first trial of this case commenced on October 21, 1975. At the close of presentation of the evidence, the District Court dismissed the marijuana charge as to appellant Swiderski (Tr. 10/22/75 at 323). Swiderski was convicted of possession of cocaine, and De Los Santos was convicted on both counts. However, notwithstanding the jurors' verdict, the District Court set aside De Los Santos' conviction for possessing marijuana with intent to distribute.

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[1]The indictment is "B" to the separate joint appendix to appellants' briefs.

[2]Appellant Swiderski and Maritza De Los Santos were married on October 25, 1975 (133, 197). (Unless otherwise indicated, numerals in parentheses refer to pages of the transcript of the re-trial).

On appeal, this Court reversed the convictions for possession of cocaine, finding errors in the District Court's charge. United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976).[3] A new trial was ordered.

C. The Re-Trial

The proof elicited at the re-trial was similar to that presented previously.

1. The Government's Case

The Government's case was based on the testimony of a 29-year-old Government informer, Martin Charles Davis, whom the Government had previously described as "not a model citizen," "a paid headhunter," and "not a nice guy." United States v. Swiderski, supra, 539 F.2d at 857. At re-trial, Davis testified that, prior to September 1, 1973, he had been a marijuana dealer and had become involved with a 16-year-old who, during the summer of 1973, told the police about Davis' narcotics activities (20, 43-46). Fearing the severe penalties of the New York State drug laws, which were to become effective on September 1, 1973, and afraid that he would be prosecuted for his violations of State law, Davis contacted the New York

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[3]In Swiderski, supra, this Court found that the judge's instructions to the jurors regarding the defense of entrapment and the testimony of the contingent-fee Government informer were inadequate. Id., 539 F.2d at 858, 860.

City police to clear his record. Davis was asked to become an informer for the police, but upon learning that "the City had no money" (22) and that he would not be paid for his services, Davis declined (22, 47-48, 50-51).

In November of 1973, Davis was approached by agents of the Drug Enforcement Administration (DEA), who "had a lot more money than the City did" and who agreed to pay Davis on a contingent-fee basis if he became an informer for them (23, 51). Because he was broke and desperate, Davis now agreed to cooperate (23, 52, 84, 91).[4]

Although Davis had met appellant Swiderski before beginning to work for the DEA, Davis did not know appellant "personally" until after he began informing (27). Thus, Davis testified that during the fall of 1973, appellant Swiderski approached him at a light show in Greenwich Village, gave Davis a sample of THC, a hashish derivative, and told Davis to try it to see if he liked it. Davis consumed the drug and expressed interest in buying more (27-28, 65-66). Davis testified that from the fall of 1973 until May 31, 1975, he met frequently with both appellant Swiderski and co-defendant De Los Santos (28-29, 66-67, 71-72), but that the informer

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[4]Davis worked as a contingent-fee informer for the DEA for more than 18 months, being paid $16,000 -- $10,000 or $11,000 of that in cash (23-24, 53). Except for two or three weeks when Davis drove a taxi, informing was his sole means of support (26, 54). He never paid taxes on the money (26, 54-55), and was not prosecuted for his violations of State and Federal narcotics laws (23, 44-45).

had neither purchased drugs from, nor sold drugs to, appellant Swiderski during that period (67-68, 71).

According to Davis, at the end of May 1975, he knew his services with DEA were going to be terminated (29) and it was then that Davis became a heavy user of marijuana, cocaine, and LSD (63, 75), a fact Davis kept from the DEA agents with whom he was working (64). The remainder of Davis' testimony dealt with a transaction involving the alleged sale to Swiderski and DeLos Santos of 3/4 ounce of a substance containing 4.1 grams, or 1/7 ounce, of cocaine.

Davis testified that on May 31, 1975, in the course of a telephone conversation with appellant Swiderski, Swiderski said that he wanted to purchase a quarter ounce of cocaine (29, 67-68). According to Davis, later that night appellant Swiderski went to Davis' hotel room and expressed interest in buying a quarter pound of cocaine (30).

After meeting with the DEA agents, Davis called appellant Swiderski and told him that the deal could be arranged (32). Davis made the necessary arrangements with three narcotics dealers, an individual named William, Gene Casey, and Carlton Bush (33-34). On June 3, 1975, at approximately 3:00 p.m., appellant Swiderski and his fiancee arrived at Davis' hotel room. According to Davis, appellant Swiderski there showed Davis a large stack of bills that appellant had in his possession (35-36). Davis testified that after picking up William, who was in front of the hotel, Davis, appellants Swi-

derski and De Los Santos, and William went to Gene Casey's apartment (36). The four entered Casey's apartment, where Bush and Casey were waiting (36). Neither Swiderski nor De Los Santos had ever previously met either Bush or Casey (76). After Bush signalled to Davis, Davis told appellant Swiderski to follow Bush into a small bedroom alcove of the apartment. The informer introduced Bush to appellant Swiderski, whereupon Bush threw a package on the bed in front of Swiderski (36-37, 88).

Davis testified that appellant Swiderski then asked De Los Santos to come into the room, where both appellants and Davis tested the cocaine in various ways (37, 95). According to the informer, appellants then discussed whether they should purchase the substance. Further, Davis testified that De Los Santos stated that while it was not good enough for personal use, the person who wanted to buy it would buy it at the proposed price (38). Appellants gave Bush $1,250 for the cocaine and, according to the informer, appellant Swiderski took the cocaine and put it in his pocket (38-39).

Appellants drove Davis back to his hotel and agreed to meet later that evening. Afterwards, the informer met DEA Agent Fekete to report what had just occurred (39).

In addition to Davis, New York City police officers Lino and Lamireta testified as part of the Government's case. On June 3, 1975, they conducted a surveillance of the Chelsea Hotel where Davis lived, saw the two defendants drive from

the hotel in the company of two other males, followed appellant Swiderski's truck to 58 West 4[illegible]th Street, saw the four persons enter the building, waited approximately half an hour, and then saw the two defendants and Davis leave the building. The two officers followed Swiderski's truck back to the Chelsea Hotel, where they saw Davis alight. The two officers were followed Swiderski's van as it proceeded up Eighth Avenue and, as it turned east on 34th Street, stopped it by swerving their car in front of the van while another Government car pulled in behind it (Lino, 102-103, 109-111; Lamireta, 124). As the officers, who were not in uniform (106, 116-117, 128), ran toward the van with their guns drawn, calling out "Police,"[5] appellant Swiderski unsuccessfully sought to drive away, hitting the cars parked in front and in back of him four or five times (Lino, 103-104, 113-114; Lamireta, 125-126).[6] Swiderski and De Los Santos were then arrested. The officers seized De Los Santos' purse, in which they found a pouch containing cocaine and $3,750 in cash (Lino, 104-105, 121) Appellant Swiderski, who was bleeding from a head injury that required hospital treatment later that evening, was found to possess $529 in cash, but no drugs (Lino, 106, 120). The drugs, cash, and pouch taken from De Los Santos, as well as the cash taken from appellant Swiderski, were introduced into evidence.

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[5]The van's windows were closed (119).

[6]Photographs showing the damage to the agents' car were introduced into evidence as Government Exhibits 7 through 13.

Frederick Martorell, a Government chemist who analyzed the cocaine, testified that the gross weight of the powder tested was 21.5 grams, or less than 3/4 ounce, and that, of the gross amount, 19.2%, or 4.1 grams (1/7 ounce) was cocaine (17-18).[7]

2. The Defense Case

Both defendants testified as part of the defense case. Appellants did not deny the events of the arrest nor that the cocaine and cash were found in the van in which they were driving; rather, appellants contended that Davis instigated the transaction, that they had been entrapped, and that they did not intend to distribute the cocaine.

Appellant Swiderski testified that, prior to meeting the informer, Swiderski had never used cocaine (136), that it was Davis who had introduced him to cocaine (137-138, 181-182), and that, while Swiderski had, prior to June 3, 1975, bought marijuana for his own use from the informer (139, 169), he had never previously purchased cocaine (138). Further, Swiderski stated that he never gave or sold any drugs to Davis (165).

Appellant Swiderski also testified that he did not speak to Davis on June 1 and 2. Swiderski explained that he and De Los Santos attended the National Boutique Show at the Hotel McAlpin on Sixth Avenue and 33rd Street in Manhattan to acquire merchandise for De Los Santos' boutique (143-144). Registration badges with their names on them and a brochure for the

[7]The chemist testified that 28.4 grams constituted an ounce.

boutique show indicating its duration from June 1-4, 1975, were introduced into evidence (144-145). On June 3, appellant Swiderski and De Los Santos intended to go to the boutique show, and decided to bring large sums in cash with which to make purchases at the show (145-147).

On the morning of June 3, however, Davis called appellant Swiderski, told him that Davis was having a party, and offered Swiderski some cocaine. Appellant Swiderski testified that he did not believe Davis, hung up the telephone, and went back to sleep (147-148). Davis called back an hour later and again invited Swiderski to Davis' hotel room (149). Swiderski agreed to see Davis before going to the boutique show, and arrived at the Chelsea Hotel with his fiancee at approximately 3:00 p.m. (149-150). Davis told them, however, that the party was being held elsewhere, and asked Swiderski and De Los Santos to drive him and another friend waiting in the hotel lobby to the new location (151-152). Although De Los Santos did not want to, appellant Swiderski agreed to drive Davis and his friend, following Davis' directions to West 48th Street (152).

Upon arriving at the building, Davis again invited De Los Santos and Swiderski to come up, offering them cocaine. While reluctant, appellants agreed to accompany Davis (53). Inside the apartment, two black men were waiting, and appellant Swiderski was introduced to one of them named "CB" or "BC" (156). While De Los Santos waited in another room,

Davis called appellant Swiderski into a bedroom. There, Davis placed some cocaine on a mirror and offered some to Swiderski (157). Appellant Swiderski called his fiancee into the bedroom, where everybody "snorted" cocaine (158). When appellant Swiderski indicated that he was ready to leave, Davis jumped up and became excited, telling appellants that they had to take something (158). At this, appellants were "shook up" and frightened (174, 175). Not wanting to upset Davis or the other men, De Los Santos said that they would take a gram (158). Davis again jumped up and told appellants that they must take the whole package of cocaine. Hearing the commotion, the other people in the apartment came running into the bedroom (158-159). Frightened and believing that they would have to pay to leave the apartment, appellant Swiderski gave "CB" $1,250, the amount agreed upon by Davis and "CB" (159-160, 210). One of the black men dropped the package of cocaine into De Los Santos' purse, and Swiderski and De Los Santos left the apartment with Davis (161, 176). Swiderski testified that he had no intention of giving the cocaine to anyone else (165).

After leaving Davis at his hotel, appellants drove to the Boutique Show at the McAlpin Hotel. At 34th Street, a car cut in front of them, and several men with drawn guns jumped out. Appellant Swiderski thought he was going to be robbed for the money. However, when he realized that the men were police officers, he immediately stopped the van. One of the men then hit appellant Swiderski on the head (162-165).

In her testimony, De Los Santos generally confirmed appellant Swiderski's account of his relationship with Davis and the events of May 31-June 1. Further, she testified that she and appellant Swiderski had tried cocaine at Davis' parties (202-203, 216, 224), and that her only intention in going to the 48th Street apartment on June 3 was to get "high" before attending the boutique show (212, 217). On cross-examination, Assistant U.S. Attorney Batchelder asked De Los Santos whether she "ever [said] to the arresting officers that 'Marty Davis did this to us' when [Swiderski and De Los Santos] were arrested"? (223). De Los Santos responded:

> When I was arrested I was given my rights and I told them that I wanted to see a lawyer, I wanted to know if it was possible for me to make Night Court, because this was in the afternoon, and they told me, "Forget about it," there was no Night Court.
>
> (224).[8]

3. The Summations and the Court's Instructions to the Jurors[9]

On summation, the Assistant U.S. Attorney argued that the possession of cocaine by appellant Swiderski and his fiancee

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[8]On rebuttal, three persons who participated in the boutique show at the McAlpin Hotel testified that they had no discussions with appellants concerning purchases (237, 239, 241).

[9]The Court's charge to the jurors is "C" to the separate joint appendix to appellants' briefs.

on June 3 with the intention to share it between themselves was sufficient to convict:

> You are going to hear they did not intend to distribute this [cocaine], therefore you got to acquit these people. Gentlemen, this is 21 grams. Maritza said one gram was sufficient. It is a blow; it is a snort. And the government asks you to infer from what happened that it is not beyond belief that a husband or a fiance and his girl friend would share that cocaine. You don't have to go out on the corner and sell it. Do you believe that for one moment that Miss De Los Santos and Mr. Swiderski, who had just had a couple of blows upstairs, would not later on share it?
>
> (252).

On rebuttal, this argument was later repeated by the Assistant United States Attorney (287).

The defense argued that the intent to distribute cocaine had not been proved by the Government (268, 270, 284-285).

During the course of his instructions to the jurors, the District Court reiterated that appellants were accused of possessing cocaine with the intention of distributing it (297-298). In defining the meaning of possession with intent to distribute, Judge Bonsal told the jurors:

> [I]ntent to distribute merely means that you intend at some point or later time to pass on all or some of it; it means you intend to sell it; it means you intend to give it away; you can intend to give it to a friend of yours or somebody who is close to you. If you are going to pass it on, that is to distribute under the statute.
>
> (299).

After a few hours of deliberations, the jurors sent a note to the District Judge, requesting further instructions about the definition of intent to distribute. In pertinent part, the note read:

> (b) Definition of intent to distribute.
>
> (c) Clarification of the following:
>
> "If both defendants possessed the drug (i.e., one paid for it and it was found in the other's handbag) can 'intent to distribute' mean one giving the drug to the other or must third parties be involved?"
>
> (320).

The following colloquy then occurred:

> MR. BATCHELDER [the Assistant U.S. Attorney]: We talked with the alternates outside and they indicated they were somewhat confused as to whether if it was from one person to another it could be possession with intent to distribute, and, indeed, it can be, and the charge itself is rather a unique situation, it is a husband and wife situation, two people extremely close, so the transfer of the drugs from one to the other is sufficient, and I think the government would request that the Court do that. The jury has specifically requested and we believe the Court can answer that question.
>
> MR. LIPSON [defense counsel for appellant Swiderski]: I would disagree. The government's theory in this case was that they were acting in concert, and I don't think a distribution from one to the other can constitute distribution for the purposes of deciding whether they had the intent to distribute.
>
> (320-321).

Over this and subsequent objections (330), Judge Bonsal repeated his prior instructions defining possession with the

intent to distribute, stating:

> You could give it to a friend of yours or even to your fiancee. If you are going to do that, that is a distribution.
>
> (326).

After further deliberations, appellants Swiderski and De Los Santos were found guilty of the cocaine charge.

ARGUMENT

Point I

THE DISTRICT JUDGE'S INSTRUCTIONS WHICH PERMITTED THE JURORS TO CONVICT FOR THE FELONY CHARGED IF THEY FOUND APPELLANTS' POSSESSION OF COCAINE AND THE INTENT TO USE IT THEMSELVES WERE ERRONEOUS, AND REQUIRE REVERSAL.

In explaining to the jurors the meaning of intent to distribute, a necessary element of the crime charged and one that was sharply disputed, the District Judge told them:

> [Y]ou could give it [cocaine] to a friend of yours or somebody who is close to you. If you are going to pass it on, that is to distribute under the statute.
>
> (299).

Obviously attempting to ascertain the impact of this instruction on a case where the Government showed joint possession, the jurors asked for a clarification of the effect of joint possession by both appellants:

> If both defendants possessed the drug (i.e., one paid for it and it was found in the other's handbag) can 'intent to distribute' mean one giving the drug to the other or must third parties be involved?

In accordance with the Government's theory at trial, that joint possession of cocaine by appellant Swiderski and his fiancee with the intent to use and exchange it between themselves was enough to constitute the crime charged, the District Judge, over defense objection, instructed the jurors in the following

manner:

> You could give it [cocaine] to a friend of yours or even to your fiancee. If you are going to do that, that is distribution.
>
> (326).

By this instruction, the jurors were allowed to convict even if they found that the only intention of appellants was to use and share together the drug they jointly possessed. This was error, and reversal is required.

The statute under which appellants Swiderski and De Los Santos were prosecuted, 21 U.S.C. §841(a)(1), is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act"). In this legislation, Congress deals with drug rehabilitation, sets forth procedures for the importation and exportation of controlled substances, and establishes penalties for drug violations. 1970 U.S. Code Cong. & Admin. News, 4566 et seq. As set forth by Congress, one of the three primary purposes of the Act was to "provid[e] for an overall balanced scheme of criminal penalties for offenses involving drugs." 1970 U.S. Code Cong. & Admin. News, supra, at 4567. Significant to the structure of the new scheme was the distinction between possession of drugs for use and possession for resale and/or distribution. As then-Congressman Weicker stated, "the penalty structure has been designed to accommodate all types of drug offenders" and "made to fit the crimes and the persons who commit the crimes." 116 Cong. Rec., Part 25, 91st Cong., 2d Sess., at 33631. Consequently, while offenses involving the

manufacture, sale, and distribution of illicit drugs for profit were treated severely, it was the intention of Congress to make illegal possession of controlled drugs for personal use a misdemeanor. 21 U.S.C. §844; see 1970 U.S. Code Cong. & Admin. News, supra, [illegible] 4575-4577.[10] As Congressman Cohelan stated, "This bill makes the attempt to separate simple possession from distribution in allocating penalties." 116 Cong. Rec., Part 25, 91st Cong., 2d Sess., at 33658, col. 2 (9/24/70). Thus, the legislative history, which itself makes no distinction between mere possession for use by joint owners and possession by one

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[10]The remarks of Congressman Ryan concerning the criminal offenses enacted are characteristic:

> [T]he bill revises the present penalty system and makes possession of all controlled substances a misdemeanor.
>
> 116 Cong. Rec., Part 25, 91st Cong., 2d Sess., at 33660, col. 1 (9/24/70).

See also 116 Cong. Rec., Part 25, supra, at 33631, col. 1 (remarks of Congressman Weicker); at 33647, col. 2 (remarks of Congressman Sisk); at 33647, col. 3 (remarks of Congressman Ottinger); at 33650, col. 1 (remarks of Congressman Anderson); at 33651, cols. 1, 3 (remarks of Congressman Brotzman); at 33652, col. 3 (remarks of Congressman Broomfield); at 33656, col. 2 (remarks of Congressman Hogan); at 33658, col. 2 (remarks of Congressman Cohelan); at 33659, col. 1 (remarks of Congressmen Minish and Pickle).

person for individual consumption, does establish a clear division between possession for use and possession for distribution to someone else. The seriousness of the latter crime arises from the fact that through its violation, illicit drugs are given to those who do not already have them.[11] Since the joint possession of drugs for use does not involve the perceived harm of wider dissemination, against which the harsher penalty was designed to guard, it is only logical to treat this crime of possession as one involving mere use, rather than distribution.

Moreover, an analysis of the relevant statutory language also reflects a congressional attempt to punish for possession with intent to distribute only those persons who distribute illicit drugs to others not already in possession. The critical question here is the meaning of "distribution." Under the statute, "distribute" means "to deliver," and "to deliver" is defined as "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists any agency

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11 [W]hen an individual encourages another to take drugs, when an individual sells drugs to another, he is torturing that person and ruining that person's life....

(Remarks of Congressman Anderson, 116 Cong. Rec., supra, at 33650, col. 1.)

relationship." 21 U.S.C. §802(11)(8). The operative word here is "transfer."[12] The accepted meaning of "transfer" is "a delivery of possession." BALLENTINE'S LAW DISCTIONARY (3d ed. 1969).[13] Thus where, as here, two people either constructively or actually are in joint, undivided possession of illicit drugs, a mere physical exchange of that material possessed does not change the attributes of possession since each person still retains his/her ownership rights. Consequently, a transfer and a distribution in the statutory sense do not occur until the object is given over to an unrelated party having no previous claim. Here, any possession shown was a joint possession between appellant Swiderski and his fiancee. In this context, any intent to exchange the substance did not create new possessory rights, and a resulting transfer or distribution. A finding based on the contrary assumption,

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[12]The language "whether or not there exists an agency relationship," has no applicability to the facts in this case and was intended to deal with a completely different situation. Under former law, a defense to a charge of selling narcotics was that the accused was acting on behalf of and as an agent of the buyer. In that situation, it was reversible error not to give the so-called "procuring agent charge," requiring the jurors to acquit if they found that the defendant was not selling, but was acting for the buyer. United States v. Winfield, 341 F.2d 70, 71 (2d Cir. 1965). The relevant statutory language, quoted above, was designed to eliminate the agency defense. United States v. Masullo, 489 F.2d 217, 221 (2d Cir. 1973), and cases cited therein. See also United States v. Marquez, 511 F.2d 62, 64 (10th Cir. 1975).

[13]BLACK'S LAW DICTIONARY (4th ed. 1951) defines the verb "to transfer" in the following similar way: "to make over the possession or control of."

permitted by the District Court's instructions here, was improper.

That appellants' joint possession and exchange of a small amount of cocaine could not constitute the crime charged is also supported by a comparison of the applicable case law and the facts involved here. United States v. Hutchinson, 488 F.2d 484 (8th Cir.), cert. denied, 417 U.S. 915 (1974), is instructive. There, a husband and wife were charged with possessing with intent to distribute 11 ounces of cocaine found in their residence. In finding that the large amount involved permitted the inference that the drugs were not for personal use,[14] that court found:

> Such large quantities constitute evidence that the cocaine was not kept by the Hutchinsons merely for personal use.
>
> Id., 488 F.2d at 489, n.10. (Emphasis added.)

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[14] Possession of extremely large quantities of illegal drugs under certain circumstances may permit an inference that the possession was with intent to distribute and not for mere personal use. See, e.g., United States v. DeBerry, 487 F.2d 448, 451 (2d Cir. 1973) (25 pounds of marijuana); United States v. Kelly, 527 F.2d 961, 965 (9th Cir. 1976) (448 grams of hashish); United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974) (110 pounds of marijuana); United States v. Echols, 477 F.2d 37, 40 (8th Cir.), cert. denied, 414 U.S. 825 (1975) (199.75 grams of cocaine); United States v. Mather, 465 F.2d 1035, 1037 (5th Cir. 1972) (197.75 grams of cocaine); see also United States v. Nocar, 497 F.2d 719, 725 (7th Cir. 1974), and cases cited therein. Here, a small amount of cocaine -- 4.1 grams, or 1/7 ounce -- was involved, and there was testimony by appellants that they had previously used the drug. See United States v. Turner, 396 U.S. 398, 422-423 (1968). Thus, any possible inference based on possession of the cocaine here was impermissible.

However, this holding makes plain the truth of its converse: that it is impermissible to base a conviction for the crimes charged here on the possession of drugs by co-owners and the consequent exchange of the drugs in the course of use.[15] See also United States v. Ramirez-Valdez, 468 F.2d 235, 236 (9th Cir. 1972); cf. Government of Virgin Islands v. Hernandez, 476 F.2d 291, 794 (3d Cir. 1973) ("In order to have convicted both husband and wife, the jury had to infer intent to distribute on the part of each").

As the Fifth Circuit recently wrote, " to participate actively in the distribution of [an illicit drug] to others one must do more than receive it as a user." United States v. Harold, 531 F.2d 704, 705 (5th Cir. 1976); see also United States v. Clayborn, 383 F.Supp. 1186 (W.D. Tex. 1974); United States v. Moses, 360 F.Supp. 301, 304 (W.D. Pa. 1973); United States v. Owens, 344 F.Supp. 1355 (W.D. Tex. 1972). Here, because the District Court's instructions allowed conviction on

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[15] United States v. Buckhanon, 505 F.2d 1079, 1081 (8th Cir. 1974), also provides a helpful comparison. In that case, Mr. Buckhanon was arrested with 29 ounces of heroin before a sale to federal agents was consummated. He was charged with possession with intent to distribute. It was the Government's theory there that Mr. Buckhanon's wife was the source of the heroin. Yet she was charged with aiding and abetting the possession of heroin with intent to distribute, not based on her transfer to her husband, but on the intended transfer to the agents. Under the Government's position in this case, that theory would have been superfluous.

the improper basis that appellants possessed the cocaine with the sole intention of using it together and transferring it between themselves, reversal is required.

Point II

THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION ABOUT CO-DEFENDANT DE LOS SANTOS' POST-ARREST SILENCE VIOLATED DUE PROCESS AND REQUIRES REVERSAL.

At trial, both defendants asserted that they had been entrapped by the contingent-fee Government informer whom they had known for almost two years. On cross-examination of appellant Swiderski's fiancee, Assistant United States Attorney Batchelder asked whether she had ever given that explanation to the arresting officers (223). This cross-examination, which impermissibly exploited appellants' post-arrest silence, was so improper as to constitute a violation of due process. Doyle v. Ohio, 44 U.S.L.W. 4902, 4905 (June 17, 1976):

> [I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
>
> Id., 44 U.S.L.W. at 4904.

While no objection was made at trial, none was necessary, since the error derives from the mere asking of the question,[16]

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[16]This case is distinguishable from United States v. Rose, 500 F.2d 12 (2d Cir. 1974), vacated and remanded, 422 U.S. 1031 (1975), on remand, 525 F.2d 1026 (2d Cir. 1975), cert. denied, 424 U.S. (1976). Rose involved evidentiary errors caused by improper cross-examination about post-arrest silence and the effect of the error in light of this Court's general rule that evidentiary objections must be raised at trial. See United States v. Indiviglio, 352 F.2d 276, 280-281 (2d Cir. en

which counsel naturally could not anticipate. As the Supreme Court has recognized:

> [T]he error we perceive lies in the cross-examination on this question [about post-arrest silence], thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.
>
> Doyle v. Ohio, supra, 44 U.S.L.W. at 4904, n.10.

Thus, because an accused who relies on his Miranda rights would be penalized by cross-examination about any subsequent silence, the Court, in Doyle, flatly precluded this type of questioning. Moreover, although no specific indication of reliance on Miranda rights is necessary, Doyle v. Ohio, supra, 44 U.S.L.W. at 4104, n.10, such an indication existed here, since De Los Santos specifically explained her custodial silence in terms of an assertion of constitutional rights.[17] Indeed,

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[Footnote continued from the preceding page]

banc 1965), cert. denied, 383 U.S. 907 (1966). Error of constitutional magnitude was not involved. However, to the extent that the Rose holding reflects a refusal to recognize that error of constitutional magnitude is created by cross-examination about custodial silence, it is inconsistent with Doyle v. Ohio, supra, and should be rejected. See United States v. Rickman, 535 F.2d 1244 (2d Cir. 1975), vacated and remanded, 44 U.S.L.W. 3748 (June 28, 1976). The Rickman case is currently sub judice.

[17] To that extent, this is an even stronger case than Doyle.

the very basis of the Supreme Court's holding that cross-examination about post-arrest silence inherently violates due process is the possibility that such silence is, in fact, caused by a reliance on valid constitutional rights (see Doyle v. Ohio, supra, 44 U.S.L.W. at 4904, n.10; compare Mr. Justice Stevens' dissent at 4905-4906), and that, despite any proffered explanation, such as was given in this case, the jurors will inevitably and impermissibly infer that custodial silence is inconsistent with an accused's trial testimony and an effort on the part of the accused to hide the truth.

Here, although the improper questioning related to the silence of appellant Swiderski's fiancee, the prejudice suffered innured to both defendants, since the central defense of entrapment inextricably bound both defendants and was presented of necessity through their own testimony. The defense contention was that the Government informer had entrapped both appellant Swiderski and his fiancee. The heart of the case was the dispute between the informer on the one side and appellants, both of whom testified, on the other. Indeed, many facts were undisputed. As this Court previously stated:

> The jury had to decide whether to believe the testimony of Davis, who was an acknowledged narcotics dealer and who was described by the government itself as "not a model citizen," "a paid headhunter," and "not a nice guy," or whether to believe the story of Swiderski and De Los Santos.
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> United States v. Swiderski, 539 F.2d 854, 857 (2d Cir. 1976).

Thus, credibility was the key issue for the jurors' determination. The impermissible inference that appellants were lying at trial -- an inference inevitably drawn from the Assistant U.S. Attorney's improper cross-examination -- made impossible the jurors' fair evaluation of the evidence presented and the defense tendered. The prejudice was unavoidably harmful and violated due process. Accordingly, appellant Swiderski's conviction should be reversed.

Point III

INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED ON APPELLANT SWIDERSKI'S BEHALF, HE ADOPTS THE ARGUMENTS RAISED IN THE BRIEF OF CO-APPELLANT DE LOS SANTOS.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Nov 24, 1976

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann